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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1996

C & D CHARTER POWER SYSTEMS, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS AS TO THE ANALYSIS THAT SHOULD BE USED WHEN CONFRONTED WITH A POTENTIAL MIXED MOTIVE CASE.

A. The Circuit Courts Have Inconsistently applied the Wright Line Test, an analysis based on the general analysis used by this Court when examining causality in cases for which there is an allegation of unlawful employer conduct in a civil rights setting.

B. The Circuit Courts have inconsistently applied different Analyses when dealing with a mixed motive decision.

C. The Board did not enter into the Required Dual Motive, as Set Forth in Wright Line, as applied to Williamson's Conduct and C & D's Suspension of Williamson.

II. THE CIVIL RIGHTS RESTORATION ACT OF 1991 ADDRESSES AN ANALOGOUS STANDARD TO BE APPLIED UNDER THE NATIONAL LABOR RELATIONS ACT.

A. The 1991 Amendments to Title VII of the Civil Rights Act of 1964 evidence a clear congressional intent to adjust the scope and reach of federal employment laws prohibiting discrimination.

B. This Court Should be Guided by the Civil Rights Act of 1991 when confronted with a Challenged Employment Decision that was Motivated by both Lawful and Discriminatory Reasons, under the NLRA.

C. The Guidelines as Set Forth in the Civil Rights Act of 1991 Should Have Been Applied to Williamson's Post-Suspension Misconduct as a Means in Limiting the Available Remedies.

PARTIES TO THE PROCEEDING

Petitioners:

C & D Charter Power Systems, Inc.

Respondents:

National Labor Relations Board.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit concerning the Petition for Review and Cross-Application for Enforcement of an Order by the National Labor Relations Board as set forth in Appendix C.

In so doing, the U.S. Circuit Court for the District of Columbia issued a judgment denying the Petition for Review and affirming the Cross-Application for Enforcement.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit denying the Petition for Review was entered in the September Term, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

In addition, this Court is authorized, pursuant to 28 U.S.C. § 1651 (a) to issue all writs, necessary or appropriate in all of its jurisdictions.

CONSTITUTIONAL AND STATUTORY PROVISIONS

National Labor Relations Act, 29 U.S.C. §158(a)(1) and (3):

Section 8 (a) It shall be unfair labor practice for an employer---

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (pertaining to representation elections under the NLRA); . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

STATEMENT OF THE CASE

1. Nature of the Controversy

This case involves the alleged violation by C & D Charter Systems, Inc.(hereinafter referred to as the Petitioner

or C & D), of Section 8(a)(1) and (3) of the National Labor Relations Act (hereinafter the "Act."). (29 U.S.C. 158 (a)(1) and (3)). Since the early 1990's, the petitioner has been involved in litigation regarding the alleged anti-union animus activities and the suspension and acceptance of the resignation of Robert Williamson, from C & D employment following his serial acts of insubordination and disruptive conduct both prior to and subsequent to his suspension. During the past five years, the litigation has advanced and was eventually heard before the National Labor Relations Board. The NLRB issued a Decision and Order in this case whereby it found, inter alia, that the Petitioner had, in a single speech, violated Section 8(a)(1) and (3) of the Act by issuing a single verbal warning, suspending and accepting the resignation of Robert Williamson and by failing to offer to reinstate Williamson because of his protected union activities. (A of the Decision and Order is set forth as Appendix B). A petition was filed by C & D with the United States Court of Appeals for the District of Columbia Circuit requesting a review of the order of the NLRB.

The Court of Appeals Ordered and Adjudged that the Petitioner's Petition for Review was denied and the Board's Cross-Application for Enforcement was granted. (A copy of which is set forth in Appendix C). The Court found that there existed substantial evidence to support the Board's findings with respect to the warning, suspension and dismissal of Williamson. In briefing the issue to the circuit court, the Board specifically referenced testimony not affirmatively analyzed by the Board or the Administrative Law Judge.

The basis controversy is whether the United States Court Of Appeals for the District of Columbia Circuit through its Order denying the C & D's Petition for Review and granting the Board's cross-application for enforcement based on the Board's factual findings, has incorrectly applied federal law, and as such, this issue should be resolved by this Court.

2. Summary of Facts

The Petitioner, C & D Charter Systems, Inc., is a Delaware corporation which at all times relevant hereto had a plant and place of business in Huguenot, New York. The Petitioner is engaged, inter alia, in the manufacturing of industrial batteries for vehicles, and the non-retail sale of batteries. During all material times, the Petitioner employed approximately one hundred and fifty seven production and maintenance employees on a three shift schedule at the Huguenot facility.

In the fall of 1990, the Union instituted an organizing effort at the Petitioner's Huguenot facility. Later, in early December of 1990, C & D began to conduct a series of small group employee meetings for the primary purpose of discussing the plant conditions and operations in the election setting. These meetings were conducted by various members of Petitioner's managerial personnel. Al Weber was, at all relevant times, Petitioner's C.E.O. and President. Arthur Imdorf held the position as the Petitioner's General Plant Manager. The position of Vice President of Corporate Service and Corporate Counsel was held by Stephen Weglarz. The Manager of Human Relations was Harry Fronjian. The plant supervisor was Mr. Balmos.

On the afternoon of December 21, 1991, the Petitioner held a plant-wide meeting at which the President/CEO of the company, Al Weber, spoke with its employees pursuant to Petitioner's rights under 8(c) of the Act. This was about 40 days prior to the National Labor Relations Board conducted election which was held during the last day of January 1991. The purpose of these meetings, which were conducted in small groups and attended by all Huguenot employees, was to discuss the plant's history, performance, and prognosis and the upcoming union election and the delicate economic situation and absence of profitability at C & D's Huguenot

plant.

The record establishes that during this speech, Mr. Weber discussed the history and status of the Huguenot plant and in passing compared that facility to a similar C & D work site in Perth, Canada. In doing so, he also presented truthful general information pertaining to the Petitioner's fragile, but improving financial position. In the course of this meeting, the Petitioner attempted to improve the morale of the plant by showing an inspirational film featuring Lou Holtz and the Notre Dame football team. Mr. Weber's speech consisted of lawful references to a review of wages, benefits and increases for the 1990 year, and a discussion of a possible consolidation of plant operations and the ongoing intention to invest money to revamp the oxide mill serving the facility. Mr. Weber's speech also made references to a plant-wide commitment to work together as a team and he also expressed the sentiment that "... certain recent events have caused me to question this faith." Mr. Weber expressed his view that there existed some dissatisfaction expressed in any desire to be represented by a Union. Throughout Weber's entire speech, he made lawful and careful review, inter alia, of the economic posture of the company, the obligations of the parties under the National Labor Relations Act and, in conclusion, he stressed the importance of the employee's vote in this upcoming election.

Routinely during most meetings, the plant employees would ask questions about the company and the upcoming Board elections. Robert Williamson attended these meetings. Williamson was employed by the Petitioner primarily as a utility worker in the assembly department from June 24, 1985 until his resignation on January 25, 1991.

During a December meeting, attended by Williamson, the employees, including Williamson, often interrupted each other by asking different questions at the same time. In an

attempt to answer and maintain a semblance of order, Mr. Imdorf, the speaker, asked the employees if they would ask only one question at a time so by he could properly respond to that particular question. While Mr. Imdorf was responding to a question, he was interrupted by Williamson who shouted out another question. Mr. Imdorf stated that he would address Williamson's question as soon as he finished answering the pending question. After Mr. Imdorf answered the prior question, he immediately asked Williamson if he could please repeat his question. At this time, Williamson rudely and publicly exclaimed, "Nothing. You're worthless."

Immediately after Williamson made this comment, Mr. Imdorf asked "What did you say?" Williamson initially denied making this rude and defamatory comment, but later, he attempted to retract his statement. However, after this shocking and dis-respectful comment was made, Williamson achieved his desired effect, the meeting had lost its sense of decorum and interchange of views stopped. Subsequently, the meeting was quickly brought to a conclusion and all of the employees were asked to resume their job duties.

Soon after the meeting, Williamson returned to his work station, he was asked if he could go to the personnel department to have a meeting with Harry Fronjian, the new Human Relations Manager, and Bob Lane. Mr. Fronjian began the meeting by reminding Mr. Williamson that he had previously been counselled, without sanctions for using disrespectful language towards Mr. Imdorf. Mr. Fronjian was referring to a previous similar small group meeting, held on January 7, 1991, also conducted by Mr, Imdorf, wherein Mr. Williamson engaged in disruptive and disrespectful conduct, again directed at Mr. Imdorf.

Thus, Mr. Fronjian was referring to an incident that had occurred just two weeks earlier whereby Williamson engaged in disruptive and disrespectful conduct when he shouted a comment that was directed toward Mr. Imdorf

while he was trying to conduct a meeting. During this meeting, the employees were asked by Mr. Imdorf if they would refrain from asking questions until the close of his speech and then, at that time, he would answer all of their questions. Almost immediately, Williamson interrupted the meeting by shouting in a loud and disruptive manner "Yeah, he might lose his place [in the text of the speech]." Mr. Imdorf rejoined that he would not and went on to complete his speech. Following this initial incident, Williamson was called into the office of Mr. Frojian where they discussed the deprecatory and antagonistic remark Williamson directed at Mr. Imdorf. Mr. Frojian also advised Mr. Williamson that he probably would be attending other employees meeting in the future, and Mr. Frojian directed him to control his temper and inappropriate outbursts during these meeting because any verbal abuse in that setting would not be tolerated, pursuant to C & D's policy.

On the January 25, 1991 meeting in Mr. Frojian's office, Mr. Williamson conveniently asserted and dissembled that he did not mean to make the "you're worthless" comment during the meeting. Mr. Fronjian informed Mr. Williamson that because this was the second incident in such a short time span that he had caused a disruption and used disrespectful language during an employee meeting, C & D had no alternative but to suspend him while the company evaluated his actions. Initially, the suspension was to be indefinite until Mr. Fronjian, the new Human Relations manager and new labor counsel, Mr. Stephen Weglarz, evaluated Mr. Williamson's past employment history and the events of that particular incident.

As Mr. Fronjian began to tell Mr. Williamson that C & D would be in touch with him about his length of his suspension and asked that he punch out and go home, Mr. Williamson abruptly stood up and exclaimed in a loud voice, "You may as well fire me now because I quit." He then began to shout expletives at Mr. Fronjian and Mr. Lane,

saying "Fuck you and this fucking place," and stomped out of Fronjian's office, slamming Fronjian's door with such a jarring force that it had dislodged the ceiling tiles and showered the men with dust and ceiling particles. Mr. Williamson's voice was so loud that it was heard by other people in the executive suite/public area of the plant's offices. (It was subsequently noted that Mr. Williamson's intemperate conduct and outbursts have been at the root of at least one other disciplinary action against him, when he almost precipitated a physical altercation between himself and another employee by yelling at the employee in an abusive manner.)

After Mr. Williamson stormed out, Mr. Tice, a C & D supervisor, upon Mr. Lane's instructions, followed Mr. Williamson into the locker room in order to escort him out of the building and to effectuate his resignation. Mr. Tice told Mr. Williamson that C & D understood that he had tendered his resignation, and that the Company would report him to the unemployment office as a "voluntary quit." Williamson shouted, "[y]ou fucking people. It's --you guys are doing it." [At the time he testified, Mr. Tice was a federal corrections officer with no connections with the Petitioner.]

Immediately after this verbal exchange, Mr. Williamson's temper heightened further and he "...went berserk...", and began abusing the adjacent locker with sufficient force as to cave in their steel sides. Williamson also turned towards Mr. Tice and screamed, "I'm going to kill you and anyone else who walks in this door." At some point in time, Williamson tendered his plant identification in a hostile manner.

Mr. Tice asked Mr. Williamson to please calm down, but when Williamson continued to rant and rave, Mr. Tice and a custodian present in the locker room, quickly exited "...in fear of severe bodily harm..." and in order to avoid an inappropriate confrontation. Mr. Tice immediately departed to

the cafeteria where the management staff was positioned in order to inform them of the latest happenings. After making a decision to call the police because of Mr. Williamson's actions, Mr. Tice returned to the area of the locker room and waited for Williamson to come out so that he could be immediately escorted from the plant. As Williamson exited the plant, he implored Mr. Tice not to inform any one else of his conduct or the damage that he had done to the lockers. However, Mr. Tice told him that it was too late and that other individuals in the Company were aware of his outrageous and extreme actions. Williamson then proceeded to shake Mr. Tice' s hand while expressing his regrets for this unexcusable actions. This was, at least, the third time that he conveniently sought to minimize and excuse his own misconduct after the fact.

On January 29, 1991, Mr. Williamson drafted a letter to Mr. Imdorf questioning the length of his "suspension" from C & D . Mr. Imdorf responded to Williamson's inquiry by stating that he had, in fact, effectuated a resignation during the meeting with Mr. Fronjian and Mr. Lane and he was no longer deemed to be an employee of the Company.

The Petitioner had, and has maintained an express policy against the use of abusive, obscene or disruptive language within the plant's limit. The Company's penalty for such initial conduct is a written warning and a three-day suspension with progressive sanctions possible. Additionally, the Company also has express policies against threatening other employees and against purposely damaging, destroying, or abusing Company property. The penalty for these more serious violations of Company policy, even on the first occurrence, includes immediate discharge. Thus, Petitioner asserted, even assuming arguendo that Williamson did not tender his voluntary resignation, he committed at least three separate offenses subsequent to his meeting with Mr. Fronjian and Mr Lane, any of which warranted his immediate discharge.

3. Proceedings Below

A. Appeal to United States Court of Appeals for the District of Columbia, Nature of Action, and Basis for Jurisdiction.

On March 13, 1996, the Petitioner filed a Petition and a supporting Brief for Review of the Decision and Order entered August 25, 1995 by the National Labor Relations Board at Case No. 2-CA-24906 in the United States Court of Appeals for the District of Columbia Circuit. Jurisdiction was properly in the United States Court of Appeals for the District of Columbia Circuit pursuant to sections 10(e), (f) and (g) of the National Labor Relations Act. 29 U.S.C. §160 (e), (f) and (g) allowing for direct appeals of final orders of the National Labor Relations Board to, inter alia, the Circuit Court for the District of Columbia.

B. Relief sought

The relief requested of this Court, as well as the relief sought from the court below, is a review of the November 2, 1994 Order by the National Labor Relations Board and the underlying ALJ's order. In this Order, the NLRB had concluded that C & D by issuing a verbal warning, suspending and discharging Robert Williamson, and by failing to offer to reinstate him, for activities protected by the Act, violated Section 8(a)(1) and (3) of the Act.

The Petitioners sought a Petition for Review from the United States Court of Appeals for the District of Columbia Circuit of the aforementioned order of the National Labor Relations Board. The Court of Appeals ordered and adjudged that the Petition for Review was denied.

REASON FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS AS TO THE ANALYSIS THAT SHOULD BE USED WHEN CONFRONTED WITH A POTENTIAL MIXED MOTIVE CASE.

The mechanical application of dealing with a mixed motive decision involves job bias cases where the challenged employment decision was motivated by both lawful and discriminatory reasons.

Section 7 of the Act (29 U.S.C. 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations." Section 8 (a)(1) of the Act (29 U.S.C. 158(a)(1)) makes it an unlawful labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7 of the Act. Section 8(a)(3) of the Act (29 U.S.C. 158 (a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to...tenure of employment or any term or condition of employment to...discourage membership in any labor organization."

Section 8(a)(3) and (1) of the Act is violated by an employer if an employee is discharged for engaging in protected concerted and union activity. NLRB v. Transportation Management Corp., 462 U.S. 393, 400-403 (1983) ; Gold Coast Restaurant Corp. v. NLRB, 995 F.2d 257, 263-264 (D.C. Cir. 1993); Southwire Co. v. NLRB, 820 F.2d 453, 459 (D.C. Cir. 1987). The question of an employer's motivation for a discharge of an employee is a question of fact and one for which is to be decided by the Board in the first instance. See Passaic Daily News v. NLRB, 763 F.2d 1543, 1551-1552 (D.C. Cir. 1984).

A. The Circuit Courts Have Inconsistently applied the Wright Line Test, an analysis based on the general analysis used by this Court when examining causality in cases for which there is an allegation of unlawful employer conduct in a civil rights setting.

In determining whether the conduct in question is unlawfully motivated, the Board will rely on circumstantial as well as direct evidence to infer discriminatory motivation on the part of an employer. It considers circumstantial evidence such as the following: a delay in the discharge after knowledge of the offense;[1] a departure from established procedures for discharge;[2] failure to warn the employee prior to the discharge;[3] failure to inform the employee of the reason for the discharge at the time of the discharge;[4] any position changes in explaining the reason for the discharge;[5]

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[1]Merchants Truck Line, Inc. v. NLRB, 557 F.2d 1011 (CA 5, 1978), enforcing 232 NLRB 676 (1977); Montgomery Ward & Co., 197 NLRB 519 (1972).

[2]Richmond Refining Co., 212 NLRB 16 (1974); D.H. Baldwin Co., 207 NLRB 25 (1973), enforcing 5085 F.2d 736 (CA 8, 1974).

[3]Great Atl. & Pac. Tea Co., 210 NLRB 593 (1974); Coble Dairy Prods. Coop., Inc., 205 NLRB 160 (1973); National Food Serv., 196 NLRB 295 (1972).

[4]Forest Park Ambulance Serv., 206 NLRB 550 (1973); Alamo Express, Inc., 200 NLRB 178 (1972), enforcing, 489 F.2d 1311 (CA 5, 1974).

[5]Coca-Cola Bottling Co., 232 NLRB 794 (1977); J.R. Townsend Lincoln-Mercury, 202 NLRB 71 (1973); Goodyear Tire & Rubber Co., 197 NLRB 666 (1972)

and the timing of the discharge in relation to other relevant facts.[6]

Once is it established that an employee's protected activity was a motivating factor in the employer's decision to take adverse action against the employee, the burden then shifts to the employer to sustain the affirmative defense that the adverse action would have taken place even in the absence of the protected conduct. NLRB v. Transportation Management Corp., 462 U.S. 393, 401 (1983)(approving allocation of the burden of proof as set forth in Wright Line, Inc., 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)).

Pursuant to section 8(a)(3) of the NLRA, an employer commits an unfair labor practice by "discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]" 29 U.S.C. §158 (a)(3). It is only when animus represents a "substantial or motivating factor" in an employer's decision to discharge an employee, that the employer violates the NLRA sections 8(a)(1) and (3). Further, "to establish a violation of section 8(a)(3), the Board's General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" and that once this is established, "the burden ... shift(s) to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Adair Standish Corp., 912 F.2d 854, 861 (6th Cir. 1990)(citing Lawson Co. v. NLRB, 753 F.2d 471, 476 (6th Cir. 1985)).

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[6]Marx-Haas Clothing Co., 211 NLRB 350 (1974); Shivers Corp., 213 NLRB 102, (1974); D.M. Rotary Press Inc., 208 NLRB 366 (1974), enforced, 524 F.2d 1342 (CA 6, 1975).

Since only discriminatory conduct, motivated by union animus, violates section 8(a)(3), establishing the employer's unlawful motivation is a precondition to finding a violation of section 8(a)(3). An employer has the right to take disciplinary action for good cause related to the maintenance of order and efficiency in his plant. Section 10(C) recognizes this right by prohibiting Board orders of reinstatement and back pay orders where the employee was "suspended or discharged for cause."

The Board in its 1980 decision in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), enforced, 662 F.2d 899 (CA 1, 1981), cert. denied, 455 U.S. 989 (1982), attempted to eliminate this uncertainty among and between the appellate courts and the National Labor Relations Board regarding the appropriate analysis for examining causality in cases for which there is an allegation of unlawful and unfair conduct. In this particular case, the Board adopted an analysis based upon that used by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). See also, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). Under the Board's analysis in Wright Line, the General Counsel has the burden to initially establish a prima facie case with regards to showing that the protected conduct was a motivating factor in an employer's decision. Once the General Counsel has met this prima facie showing, the burden then shifts to the employer to demonstrate, as an affirmative defense, that the decision would have been the same even in the absence of the protected conduct.[7] It is this shifting of the burden from the employee to the employer

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[7]Wright Line, Inc., supra. See also, Herman Bros., Inc., 252 NLRB 848 (1980); United Parcel Serv., 252 NLRB 1015 (1980); Valley Cabinet & Mfg., Inc., 253 NLRB 98 (1980); Weather Tamer, Inc., 253 NLRB 293 (1980).

which distinguishes it somewhat from the Board's Mt. Healthy-Wright Line test from the "dominant motive" analysis applied by several of the circuit courts. Although the burden shifts, the shift does not undermine the established principle that the General Counsel must establish an unfair labor practice by a preponderance of the evidence and also carries the burden of persuasion. While positing that the two types of section 8(a)(3) cases, pretext and mixed motive, are analytically different, the Board in Wright Line has acknowledged the Mt. Healthy test was readily applicable to both.

Where a violation of section 8(a)(3) is charged, the question of whether the employer actually changed the terms, conditions or tenure of an employee's employment is rarely disputed. What is most often in contention is whether the employer's intended to encourage or discourage the employee's union membership. Further, an employer may still avoid section 8(a)(3) liability, despite a prima facie showing of discriminatory intent, by proving that the employer's motive underlying his action was not attended by "discriminatory consideration."[8]

The Board has consistently found Wright Line applicable in all section 8(a)(3) cases where the employer's motive was an issue. The appropriateness of Wright Line in pretext situations has received some special consideration.[9]

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[8]Continental Chem. Co., 232 NLRB 705, 96 LRRM 1327 (1977). See NLRB v. Collier, 553 F.2d 425, 95 LRRM 2615 (CA 5, 1977), denying enforcement to 223 NLRB 1492 (1979); Mosher Steel Co. v. NLRB, 568 F.2d 436 (CA 5, 1978), enforcing in part 226 NLRB 1163 (1977).

[9]E.G., Webb Furniture Enters., 272 NLRB 312 (1984).

More recently, this Court in St. Mary's Honor Center v. Hicks, 61 U.S.L.W. 4782, 113 S.Ct. 2742, 421 L.Ed. 2d 407 (1993), affirmed the essential approach of Wright Line and indicated that the party claiming the illegal factor does not prevail merely by a showing a possible bad motive, such a juxtaposition is not sufficient to support a ALJ's or Board's determination. Correctly applied, once the employer has satisfied his burden of production by coming forward with a nondiscriminatory reason for its action, the employee no longer enjoys the benefit of any presumption. The employee still must establish that the employer intended the illegal action. In short, the burden of persuasion still resides with the General Counsel.

B. The Circuit Courts have Inconsistently applied different Analyses when dealing with a mixed motive decision.

The circuits have variously applied different rules of law when confronted with a mixed motive decision. Further, the circuit courts do not appear to agree upon the "quantum of animus" necessary to find a violation of section 8(a)(3).[10]

The First Circuit has required that the discriminatory motive be the primary, or controlling, factor promoting the

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[10]See, e.g., NLRB v. Montgomery Ward & Co., 554 F.2d 996, 1002 (CA 10, 1977)("partially motivated"); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 570, (CA 4, 1977)(no discharge "except for"); NLRB v. Townhouse TV & Appliance Corp., 531 F.2d 826, 828, (CA 3, 1972)("substantial or motivating cause"); NLRB v. Fibers Int'l Corp., 439 F.2d 1311 (CA 1, 1971)("dominant motive").

employer's conduct.[11] In one case, the First Circuit noted that the Board must articulate, as well as, apply that the court's standard and "find affirmatively that the discharge would not have been effectuated but for the improper reason."[12]

In a similar instance, the Ninth Circuit has taken the position in requiring that the improper motive must be dominant and the "moving cause" of the employer's conduct.[13] The Ninth Circuit went on to state that the test in such instances is whether the business reason or the protected union activity is/was the predominant or moving cause behind the discharge.[14]

The Fourth Circuit has taken a different approach

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[11]NLRB v. South Shore Hospital, 571 F.2d 677 (CA 1, 1978); Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251 (CA 1, 1978); NLRB v. Rich's of Plymouth, Inc., 578 F.2d 880 (CA 5, 1978), denying enforcement in relevant part to 232 NLRB 621, 96 LRRM 1345 (1977); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (CA 1, 1977), enforcing per curiam 224 NLRB 1547 (1976); NLRB v. Circle Bindery, Inc., 536 F.2d 447 (CA 1, 1976).

[12]Coletti's Furniture, Inc. v. NLRB, supra.

[13]Stephenson v. NLRB, 614 F.2d 1210, (CA 9, 1980); Polynesian Cultural Center, Inc. v. NLRB, 582 F.2d 467 (CA 9, 1978).

[14]NLRB v. West Coast Casket Co., 469 F.2d 8781, 874, (CA 9, 1972), quoting NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (CA 9, 1970); accord, NLRB v. Miller Redwood Co., 407 F.2d 1366 (CA 9, 1969); Signal Oil & Gas Co. v. NLRB, 390 F.2d 725 (CA 9, 1966)

when confronted with the issue of whether the business reason or the protected union activity is the moving cause behind the employment discharge. The Fourth Circuit has refused to enforce the Board's finding of a section 8(a)(3) violation where, the court viewed the board's conclusion that the company's anti-union motivation was based on "mere suspension and conjecture."[15] Presently, the circuit courts appear not to agree as to extent that the discriminatory motive is to be applied.

C. The Board did not enter into the Required Dual Motive, as Set Forth in Wright Line, as applied to Williamson's Conduct and C & D's Suspension of Williamson.

As set forth in Wright Line, the Board attempted to resolve the uncertainty that existed among the appellate courts and the National Labor Relations Board as to the analysis to be implored when examining cases where there exists an allegation of an unlawful labor practice by an employer. In resolving this issue, the Board, in adopting an analysis based upon the one as set forth by this Court in Mt. Healthy City, established that the starting point with a mixed motive analysis rests with the General Counsel.

The General Counsel has the burden of proof in establishing a prima facie case with respect to showing that the employee's alleged protected conduct was a motivating factor in the employer's employment decision with regard to the employee. Once this burden is met by the General Counsel, the burden then shifts to the employer to demonstrate, as an affirmative defense, that the decision in

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[15] Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1339, 93 LRRM 2625 (CA 4, 1976).

regards to the employee's employment would have been the same even in the absence of the employee's protected conduct. Even though the burden shifts from the general Counsel to the employer, the General Counsel still must affirmatively establish an unfair labor practice under Section 8(a)(3).

In the case at hand, the Administrative Law Judge and the Board failed to consider or resolve the issue of a dual motive or the requisite analysis. The Board, in resolving the issues, never analyzed whether or not, or to what degree or extent, Williamson's misconduct and disruptive behavior was a motivating factor in C & D's decision. Additionally, if this burden was met by the General Counsel and had shifted to C & D to affirmatively show that the decision would have been the same even, in the absence of the alleged employer's action (acceptance of resignation or underlying suspension), this burden would have easily been met based on Williamson's serial record acts of insubordination and disruptive conduct prior to and subsequent to his suspension from employment with C & D, notwithstanding his voluntary resignation from employment.

The ALJ erred in failing to resolve the credibility dispute between Williamson and C & D, and simply generally credited Williamson testimony over C & D's. The ALJ in his decision, credited the testimony of Williamson in that he did not voluntarily resign from his position at C & D. The label for such predicated acts-suspension, then termination with or without resignation-does not address the basis factual or legal issue. The ALJ further found that as of the date of January 31, Williamson's indefinite suspension was converted into a discharge. The underlying credibility finding were unsubstantiated in the ALJ's decision and are completely unsupported by the record. The ALJ also arbitrarily found that C & D's reasons for refusing to reinstate Williamson (i.e. profanity and violence) were pretextual and that C & D did not sustain its burden. The ALJ made another grossly

arbitrary finding and arbitrarily credited Williamson testimony that Mr. Imdorf came from behind the podium and yelled at him for asking his question, despite the fact that no less than eight other individuals contradicted the testimony of Williamson. (No other witness than Williamson reported such behavior to Mr. Imdorf.) Again, the law and the record clearly contradicts such a finding and supports the conclusion that it was Williamson's own blatant insubordination which led to C & D's suspension.

Another example of an arbitrary creditability determination made by the ALJ as to Williamson's testimony, is the finding that C & D "has not shown by a preponderance of the evidence that the threat [to kill Tice] was made." (Appendix A-10). The ALJ credits Williamson's uncorroborated denial of this threat despite the existence of an overwhelming quantity of strong evidence to the contrary. The record reflects that Williamson angrily left Mr. Fronjian's office by slamming the door with excessive force and used profanity as he left. Other individuals in the area open to the public heard this vulgar language in the commotion caused by Williamson. After this outburst, Williamson proceeded to the general locker area whereby he proceed to beat on the lockers and told Mr. Tice, "I'm going to kill you and anybody else who walks in this door." At this particular time, Williamson was in such a rage that he had to be escorted off company property by the police. In the face of all this evidence and testimony, the ALJ nonetheless credited Williamson's denial that he made such a threat on Mr. Tice's life. This is another example of a finding by the ALJ for which is completely unsubstantiated by the record. Also, as of the date of the ALJ hearing, Mr. Tice was a federal corrections officer without any contacts involving the Petitioner.

Both the ALJ and the Board inappropriately minimized Williamson's initial course of willful misconduct and his course of post-suspension misconduct. Williamson's conduct

consisted of an extended, willful, disruptive course of conduct which should be viewed as dissipating any "concerted activity" component. As such, this case presents to this Court, the issue as to the proper analysis to be used when confronted with a mixed motive employment decision. This case will allow this court to intervene so that the proper analysis, under Wright Line can be applied to the case at hand, and industrial order attained.

II. THE CIVIL RIGHTS RESTORATION ACT OF 1991 ADDRESSES AN ANALOGOUS STANDARD TO BE APPLIED UNDER THE NATIONAL LABOR RELATIONS ACT.

This Court should hold that Title VII of the Civil Rights Act of 1964, as amended in 1991, supports the Petitioner's view of the issues in this appeal. The 1991 amendments to Title VII of the Civil Rights Act of 1964 have significantly changed mixed motive jurisprudence and appear to reflect a congressional response to this Courts rulings that narrowed the scope and available remedies under federal employment discrimination laws. Also, it is the latest policy direction from Congress concerning similar employment/workplace issues. The substantial changes and additions to the 1964 Civil Rights Act show an apparent congressional intent to expand the effectiveness of discrimination laws in the federal employment sector.

A. The 1991 Amendments to Title VII of the Civil Rights Act of 1964 evidence a clear congressional intent to adjust the scope and reach of federal employment laws prohibiting discrimination.

In 1991, Congress attempted to clarify the Mt. Healthy type of analysis when confronted with the issue of whether the business reason or discrimination was the moving factor

behind the employee's discharge of his/her employment through the Civil Rights Act of 1991. The congressional enactments sought to directly address protection of the discrimination laws and the remedial scope of the employee. The purpose of the CRA was to inter alia, adjust remedies for intentional discrimination and unlawful harassment in the workplace.

There existed, inter alia, much debate as to whether or not a mixed motive decision violated Title VII of the Civil Rights Act of 1964. The problem was addressed by the Supreme Court in Price Waterhouse v. Hopkins, 485 U.S. 933, 109 S.Ct. 1775 (1989). The issue the Court sought to resolve was "the respective burdens of proof" of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. Id at S.Ct. 1781. The prevailing plurality concluded that while a plaintiff did not have the burden of proving that, absent discrimination, the decision would have been otherwise, the employer could nonetheless avoid liability by proving that "even if it had not taken the unlawful motive into account, it would have come to the same decision regarding a particular person." Id at 1786. Such a showing was to be made "by a preponderance of the evidence" rather than the more demanding "clear and convincing evidence" test. Id at 1792.

The CRA of 1991 was promulgated in response in part to the aforementioned decision in which there existed some job bias cases that involved a challenged employment decision that was motivated by both lawful and discriminatory reasons. Section 107 of the CRA pertains to and adjusts the holding as set forth in Price Waterhouse v. Hopkins.

Under this section of the 1991 Act, an employment action violates Title VII if the discrimination is a motivating factor in that decision, regardless of whether lawful motives were also factored into the decision. However, if the

employer establishes that the same employment decision would have been made in the absence of discriminatory motivations, that showing will not alter the existence of a Title VII violation, but limits the available remedies. Title VII § 706(g)(2)(B), 42 U.S.C. §2000e-5(g)(2)(B), as amended by CRA of 1991, Sec. 107(b).

The court, then, is able to restrain the employer from future violations without placing the employee in a better position than he or she would or should have been in absence the employer's partially improper motive. Therefore, the issue involving whether or not an employer would have made the same decision in the absence of any discriminatory motive is principally relevant in the remedial phase of the litigation.

B. This Court Should be Guided by the Civil Rights Act of 1991 when confronted with a Challenged Employment Decision that was Motivated by both Lawful and Discriminatory Reasons, under the NLRA.

The purpose of the Civil Rights Act of 1991 was to provide remedies for intentional discrimination and unlawful harassment in the workplace, to confirm statutory authority and provide guidelines for lawsuits or workplace related disciplinary issues. Because these additions and changes to the Civil Rights Act of 1964 are substantial and dramatic in their nature and reach, it is apparent that Congress intended to provide additional guidelines for courts that are confronted with employment related mixed motive decisions. Because these established guidelines were not followed by either the ALJ or the NLRB as applied to Williamson and his post-suspension misconduct, this Court should reverse their determination and conform the remedial orders below to the stated congressional guidelines.

C. The Guidelines as Set Forth in the Civil Rights Act of 1991 Should Have Been Applied to Williamson's Post-Suspension Misconduct as a Means in Limiting the Available Remedies.

Once an employer establishes that he/she would have made the same employment decision even in the absence of discriminatory motivations, this showing will not negate the existent violation of law, but imposes a limitation on the available remedies. Title VII §706(g)(2)(B), 42 U.S.C. §2000e-5(g)(2)(B), as amended by CRA of 1991, Sec. 107(b). The court, is then able to have the employer prospectively adjust policy and to avoid engaging in future violations without placing the employee in a better position that he/she would have been in the absence of the "unlawful" component of the employer.

Where an ostensible mixed motive employment decision has been found to be tainted, the employer cannot be required to hire, reinstate or promote the plaintiff or to reimburse the plaintiff for any back pay or damages if the employer can establish that it would have taken the same employment action even in the absence of any discrimination.

Rehiring, job reinstatement, promotion, back pay, and damages are unavailable remedies upon a showing that the same action would have been taken in the absence of any discrimination, only limited relief should be available against the respondent. It would be within the Board's discretion to award appropriate declaratory and injunctive relief (other than promotion, job reinstatement, or admission to or reinstatement of union membership).

In light of his post-suspension misconduct, Williamson

would have been suspended and/or his resignation accepted absent his alleged protected union activity and he would also have been disqualified for purposes of reinstatement and back pay. Assuming that a prima facie case exists in support of the contention that the protected conduct of Williamson was a factor in the C & D's decision to indefinitely suspend Williamson or can be established by General Counsel; Williamson's suspension would still have been imposed and his resignation accepted based upon his misconduct. Williamson violated company rules and acted with such gross insubordination that the result would have been the same.

C & D had a long-standing company policy regarding, inter alia, the usage of profanity at the workplace, verbal or physical threats directed towards other employees, damage to company property and insubordination. The company rules clearly indicated that a statement to the effect that committing any of the aforementioned violations would be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, pending on the severity and/or frequency of the violation.

The Petitioner's rules were clearly and blatantly violated by Williamson through his actions on the day for which he tendered his resignation. While Williamson was in the personnel department (a public area) speaking with Mr. Frojian and Mr. Lane in regards to his suspension, Williamson violated the company rules when he shouted, "You may as well fire me now because I quit." Williamson immediately began to shout expletives at Mr. Lane and Mr. Fronjian saying "Fuck you and this fucking place." Williamson's voice was so loud that it was heard by other individuals in the executive suite/public area of the plant's personnel office. Williamson acknowledged that even though he knew of the location of the Petitioner's posted company rules and that he had reviewed them, he had never "heard people shout" obscenities in the reception area of the plant as he had done.

Other employees also testified as to the use of profanity in the workplace and the rules prohibiting its usage. Mr. Oliver, a pro-union employee and a Board witness, also active in the Union campaign and still employed, testified that he recognized the culture and customs of the plant and further acknowledged that anyone "should be suspended" for shouting obscenities in the general reception area of the plant. Another Board witness employee, Morgan also testified that he never heard of someone shouting obscenities in the reception area. As a matter of fact, the only testimony that "shop talk" was used at the plant referred to profanity used in the assembly and manufacturing areas of the plant. There was no testimony that profanity was used in the reception area or offices where Williamson made his remarks.

Through his actions, Williamson further violated the Company's rules when he threatened to kill supervisors including Mr. Tice, an ex-production supervisor. Mr. Tice testified that while he went to the locker room for the purpose of escorting Williamson out of the building and to acknowledge his resignation, Williamson "looked at me very straight in my eye and [said] 'You know, I'm going to fucking kill you. I'm going to fucking kill you. I'm going to kill the next person that walks through the door.'" After this exchange, Mr. Tice and a present custodian immediately quickly exited the locker room in fear of severe bodily harm and in order to avoid an inappropriate confrontation.

Mr. Williamson's insubordination at the employee information meeting also violated company policies. The record is replete with instances of Mr. Williamson' s continued insubordination, violence and use of profanity at the plant. Therefore, C & D had more than ample cause to discharge Williamson even assuming arguendo that union animus was a motivating factor in his alleged discharge.

The ALJ in his Order(see appendix A), subsequently

adopted by the NLRB in its August 25, 1995 Order (see appendix B), found that by issuing a verbal warning, suspending and discharging Williamson and by failing to reinstate him, for activities protected by the Act, C & D violated Section 8(a)(1) and (3) of the Act. The ALJ ordered that the C & D cease and desist from inter alia, disciplining, suspending and discharging employees for activities protected by Section 7 of the Act and in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act. Further, the ALJ also ordered, as remedies, that C & D offer Williamson immediate and full reinstatement to his former position, or if such a position is no longer available, to a substantially equivalent one, without prejudice to his seniority. The ALJ also ordered Williamson to be made whole by C & D for any loss of earning, with interest, he may have suffered from the time of his suspension to the date of C & D offer of reinstatement.

When viewed in light of the CRA of 1991, the remedies awarded by the ALJ were not in compliance with the established guidelines as set forth by Congress. The CRA of 1991 provide that once a mixed motive decision has been found to be unlawful, the employer cannot be required to hire, reinstate, or promote the employee or to pay the employee back pay or damages, if the employer can establish that it would have taken the same employment action in the absence of any discrimination. Adjudicators have the discretion, inter alia, to grant relief other than promotion, job reinstatement, or admission or reinstatement to union membership.

The ALJ ordered that Williamson's reinstatement to his former position and back pay with interest. This order which was adopted by the NLRB is in contravention with the CRA's guidelines as pertaining to available remedies since C & D established the fact that it would have made the same decision to terminate Williamson in the absence of any

discrimination. As mentioned above, Williamson seriously violated the lawful company rules of C & D when inter alia, Williamson threatened the life of a C & D supervisor, smashed and damaged company property, violated every company policy with regard to insubordination, and flagrant abuse of the company policy regarding the use of profanity at the plant.

An employer has a right to maintain discipline in the workplace. J.P. Steven & Co., 219 NLRB 850 (1975)(Board decision upholding the employer's right to discharge employees who disrupted a meeting planned for the presentation of employer views on unionization.). While an employer may not discipline employees for actions protected under the Act, the employer need not accept insubordinate behavior not contemplated under the NLRA. As argued above, Mr. Williamson's comments were not protected under the Act. A fortiori, C & D did not commit an unfair labor practice in disciplining Mr. Williamson or accepting his resignation. Further, because the ALJ order awarding Williamson reinstatement, coupled with back pay and interest as a remedy for C & D violation of Section 8(a)(1) and (3) of the Act and this award of remedies was apposite of the guidelines as set forth in the CRA of 1991, is blatantly out of step with federal policy and requires correction by this Court.

CONCLUSION

For the reasons propounded in this petition, this Honorable Court should issue a Writ of Certiorari in this case.

Respectfully Submitted,

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Supreme Court, U.S.
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No. 95 -

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1996

C & D CHARTER POWER SYSTEMS, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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C & D Charter Power Systems, Inc. ***and*** **International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW.** Case 2-CA-24906

August 25, 1995

DECISION AND ORDER

By Chairman Gould and Members Stephens and Browning

On November 2, 1994, Administrative Law Judge D.Barry Morris issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as further discussed below, and to adopt the recommended Order.

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[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products.* 91 NLB 544(1950), enfd 88 F.2d 363 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) and (3) of the Act by warning, suspending, and discharging employee Robert Williamson because he engaged in activities protected by the Act. In its exceptions, the Respondent argues, inter alia, that Williamson's conduct was not "concerted" within the meaning of the Act. For the reasons set forth below, we find no merit in this contention.

The events in this case occurred in the context of a union organizational campaign. During the fall of 1990, and continuing until the election on January 31, 1991, the Respondent expressed its antiunion sentiments in 50 or 60 mandatory meetings it held with employees, many of which lasted approximately one and one-half hours. The record shows that employees were annoyed that they were required to attend these numerous antiunion meetings and to forego the extra income they could have earned on the production line under the Respondent's piece incentive program. The record also shows that employees conveyed this annoyance to the Respondent's officials during the meetings.

On January 7, 1991, the Respondent held one of its many meetings with employees concerning the Union's organizing campaign. Plant Manager Arthur Imdorf read a prepared speech. At one point, Williamson interrupted the speech, stating that he would rather perform his job than attend these antiunion meetings. Imdorf told employees to hold their questions until after his presentation. Williamson then exclaimed, "Don't interrupt him; he might lose his place." Imdorf replied that he would not, and he completed his speech without further incident.

The Respondent held another mandatory meeting on January 25, 1991. This meeting began at approximately 1:30 p.m. and continued to approximately 3 p.m. After

Imdorf completed his presentation, one employee asked "[W]hy don't you give us the respect of choosing whether to come to these meetings or not. And not make them mandatory because it's costing us money?" Imdorf replied that the meetings would continue until he said otherwise. Williamson then raised his hand, said he had a two-part question, and asked, "How many more of these meetings are we going to have?" At that point, Imdorf exclaimed, "I've heard this question over a hundred times in every meeting. I'm getting tired of this question. These meetings are going to continue until I say that we don't have these meetings anymore." Imdorf then told Williamson to ask his question. Williamson initially said, "You're worthless," but then immediately retracted the remark. Stating "Whoa, I don't mean you personally. But the question was worthless."

It is well established that individual action will be considered "concerted" if "the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group." *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992), and cases cited therein. enfd. 53 F.3d 261 (9th Cir. 1995); see *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988). It is also firmly established that union activity is, "by definition . . . concerted within the meaning of Sec. 7 of the Act, without regard to the fact that [an employee] may have acted alone." *Carpenters Local 925*, 279 NLRB 1051, 1059 fn. 40 (1986)

We find that both of these principles are applicable here. At the meetings, Williamson expressed his displeasure at being required to be in attendance, and he stated that he would rather be working. Williamson's comments constituted concerted activity because they were the logical outgrowth of the prior concerted complaints the employees voiced about being required to attend the Respondent's numerous meetings and to lose the incentive

pay they could otherwise be earning. Indeed, Imdorf himself acknowledged that Williamson's question at the January 25, 1991 meeting reflected a group concern because Imdorf answered it by stating that he had heard it "over a hundred times" and "in every meeting."

Furthermore, as the judge found, Williamson was an active union adherent, and his outspoken opposition to the Respondent's meeting was a further expression of his union sentiment. Because Williamson's remarks constituted union-related activity, it is irrelevant that he acted alone.

Accordingly, for all these reasons, we find no merit in the Respondent's claim that Williamson's conduct was not concerted. We further find, for the reasons stated by the judge, that Williamson's remarks did not exceed the protections of the Act. Accordingly, we conclude, in agreement with the judge, that the Respondent's discipline and discharge of Williamson violated Section 8(a)(1) and (3) of the Act.[2]

ORDER

The National Labor Relations Board Adopts the recommended Order of the administrative law judge and

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[2] As they state in *Liberty Natural Products*, 314 NLRB 630 fn. 4 (1994), Chairman Gould and Member Browning question the validity of the ultimate holding in *Meyers I & II*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 487 U.S. 1205 (1988). They note, however, that the conduct here would be found concerted even under the standard of those cases. 268 NLRB at 497; 281 NLRB at 382.

orders that C & D Charter Power Systems, Inc., Huguenot, New York, its officers, agents, successors, and assigns, shall take the action set forth in the order.

Dated, Washington D.C. August 25, 1995.

William B. Gould IV, Chairman

James M. Stephens, Member

Margaret A. Browning, Member

(SEAL) National Labor Relations Board

Nancy K. Reibstein, Esq. and *Larry Singer, Esq.*, for the General Counsel.

Robert S. Mirin, Esq. (Mirin & Jacobson), of Harrisburg, Pennsylvania, and *Steven J. Seglarz, Esq.*, of Plymouth Meeting, Pennsylvania, for the Respondent.

UNITED STATES OF AMERICA
BEFORE THE NATION LABOR RELATIONS BOARD
DIVISION OF JUDGES

C & D CHARTER POWER SYSTEMS, INC.

and Case 2-CA-24906

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

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Brooklyn, NY for the
General Counsel.
Robert S. Mirin, Esq.
(Mirin & Jacobson),
Harrisburg, PA and
Steven J. Weglarz, Esq.,
Plymouth Meeting, PA for the
Respondent

DECISION

Statement of Case

D. Barry Morris, Administrative Law Judge. This case was heard before me in New York City on December 7 and 8, 1993, January 18 through 21, 1994, and April 5 through 8, 1994. Upon a charge filed on February 1, 1992, and amended on December 7, 1993, alleging that C

& D Charter Power Systems, Inc.[1] (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs.[2] Briefs were filed by the parties on June 21, 1994. In addition, a reply brief was filed by Respondent on July 21, 1994.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a Delaware corporation with an office and place of business in Huguenot, New York, is engaged in the manufacture and nonretail sale of batteries. Annually it purchases and receives goods valued in excess of $50,000 directly from points located outside the State of New York. Respondent admits, and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I find, that International Union, United Automobile, Aerospace & Agricultural Implement Workers

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[1] The correct name of Respondent is C & D Charter Power Systems, Inc. The caption has been amended accordingly.

[2] General Counsel's motion to correct the transcript is hereby granted.

of America, UAW (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In the fall of 1990,[3] the Union initiated an organizing effort at Respondent's Huguenot facility. Robert Williamson, an employee in the assembly department, testified that he learned of the union organizing campaign and attended a union meeting at the home of employee Gregg Oliver. Williamson testified that he attended approximately five union meetings at various offsite locations. In January 1991, on two separate occasions, Williamson distributed union leaflets to approximately 20 employees in the cafeteria. Williamson testified that during October 1990, he and the other assembly department employees wore black armbands to signify their support of the Union. He further testified that towards the end of October Respondent distributed vote "no" buttons. Williamson took two of the buttons and taped over the "no" and wrote "yes" instead. Williamson testified that he wore the button to one of the management meetings at which time Plant Manager Arthur Imdorf commented, "there's a man who knows what he wants." Williamson further testified that at a management meeting at the end of October or at the beginning of November Williamson stated "this is why we need a union in this facility." After Human Relations Manager Harry Fronjian and Assembly Department Supervisor Robert Balmos

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[3] All dates refer to 1990 unless otherwise specified.

stated that they hoped a union would never come into the facility, Williamson testified that he said "the union is the only way we're going to straighten this mess out."

B. *December 21, 1990 Meeting*

On the afternoon of December 21, the day before the Christmas break, Respondent conducted a plant-wide mandatory meeting at which the president of the company, Al Weber spoke. Williamson testified that Weber said that the company was "operating with three facilities too many at that time and that they were very unhappy with ...our lack of enthusiasm or respect we were showing them." Williamson further testified that Weber stated "if we voted and got a union and the union wanted raises that they would have to close the plant down because it was losing money." In addition, Williamson testified that Weber stated that if the Union came in, the company would not refurbish the oxide mills.

The record contains the text of Weber's speech. The text of the speech states, in pertinent part:

> . . . if C & D had closed the Huguenot plant last year, and had closed out its motive power operations in Perth, the company would have had a much better financial performance in 1990 than it did.
>
> . . . We could achieve some real cost savings and maybe hang on to the motive power business longer if maybe hang on to the motive power business longer if we consolidated our operations at Perth, or at Huguenot, or at some other location . . . Because of the current economic conditions

we may have one or two plants too many right now . . . .

Now, on tope of all these business considerations and economic problems facing this plant, the UAW has shown up and asked for an election. Words cannot express my extreme disappointment about this situation. I simply cannot believe that we are going to have to go through another election campaign at Huguenot. Particularly, since a year ago I thought we had established a commitment to one another to continue working together as one team, without a union . . .

There is no doubt that we are in a crisis situation here at Huguenot. Make no mistake about that. This plant is at a cross-roads. Because of its economic situation, this plant's future is uncertain . . .

C. January 7, 1991 meeting

Imdorf presented another speech to the assembly department on January 7, 1991. Williamson testified that Imdorf was reading a prepared speech in which he stated that "we didn't need a union" and "told us his feeling about how unions are disruptive and he feels that the plant didn't need that." Imdorf asked the employees to hold heir questions, at which point Williamson called out "Yeah, he might lose his place." After the meeting, Imdorf told Williamson that "he didn't care for my comment in the meeting." Several minutes later Fronjian called Williamson into his office and according to Fronjian's testimony, asked Williamson why he interrupted Imdorf. Williamson replied "I was mad and I was a little bit angry

that he was reading from prepared notes." Fronjian then issued a verbal warning to Williamson.

D. *January 25, 1991 Meeting*

On January 25, 1991 Imdorf conducted another mandatory meeting with the assembly and maintenance departments. When Imdorf completed his presentation, several employees asked questions. After employee, Bob Warden, asked a question, Williamson raised his hand and said that he had a two-part question. Williamson then asked "how many more of these meetings are we going to have?" Williamson testified:

> At the time after Mr. Imdorf jumped out from behind the podium pointing at me, screaming, yelling I've heard this question over a hundred times in every meeting. I'm getting tired of this question. These meetings are going to continue until I say that we don't have these meetings anymore.

After that exchange Imdorf went back behind the podium and told Williamson to proceed with his question. At that point Williamson called out "you're worthless." Williamson testified that he immediately said "I don't mean you personally, but the question was worthless".

Immediately after the conclusion of the meeting Williamson proceeded to the office of his supervisor, Robert Balmos. Williamson asked Balmos if he could arrange a meeting with Imdorf so that Williamson could apologize once again. Balmos said that he would see what he could do. Later, Williamson was called to Fronjian's office. Fronjian told Williamson that he was being suspended because of his remark during the meeting.

Williamson replied that he had mistakenly made the remark, that it was not what he had intended to say and that he had immediately corrected himself after the remark. Williamson testified that Fronjian replied "it doesn't matter how sorry you are, you are still suspended." At that point Williamson stated "why don't you do what you really want to do and fire me." Williamson then left Fronjian's office he shouted "f--you, f-- this place." Williamson then went to the locker room to take a shower. Richard Haring, a maintenance department employee, testified that Williamson "started pounding on the lockers." John Tice, the second-shift supervisor, testified that after Williamson took his shower he told Williamson, "I understand that you've quit, and you know that's the way we're going to record it and we'll let the unemployment know." Tice testified that Williamson then got "upset and furious" and told him "you f-- people, it's you guys are doing it . . . I'm going to f-- kill you." Williamson denied that he made any threats to Tice.

III. DISCUSSION AND CONCLUSIONS

1. Threat of Plant Closure and Loss of Benefits

The amended complaint alleges that at the December 21 meeting Weber threatened employees with plant closure and with loss of benefits if they chose to be represented by the Union. Williamson testified that at that meeting Weber stated "if we voted and got a union and the union wanted raises that they would have to close the plant down because it was losing money". In addition, Williamson testified that Weber stated if the Union came in they would not refurbish the oxide mills. Arnold Schure, an assembly department employee, remembered Weber saying that "if we all work together we can solve all our

problems, we don't need a union butting in to try to help solve problems, that we could do it ourselves. And that we're all at a crossroads about our jobs". Steven Weglarz, Respondent's General Counsel, testified that he instructed Weber "to make sure that he read every word from the prepared document". Weglarz testified that he had a copy of the speech and followed it word for word as Weber read it. Fronjian corroborated Weglarz' testimony and stated that Weber was instructed by Welglarz "not to deviate from the script or the text". Similarly, Imdorf testified that Weber read from a prepared text. The text of the speech is in evidence. I credit Weglarz' testimony, which was corroborated by Fronjian and Imdorf. Weber was instructed by the company's General Counsel not to deviate from the prepared text. I believe it is likely that he followed those instructions. See *King Trucking Co.*, 259 NLRB 725, 728 (1981). Accordingly, I find that the text of the speech in evidence contains the remarks made at the meeting by Weber.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Court Stated:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit". He may even make a prediction as to the precise effects he believes

> unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

In the speech Weber stated that "I can only hope that the faith I have had in this operation was justified. I must admit, however, that certain recent events have caused me to question this faith". Weber continued:

> Now, on top of all of these business considerations and economic problems facing this plant, the UAW has shown up and asked for an election. Words cannot express my extreme disappointment about this situation. I simply cannot believe that we are going to have to go through another election campaign at Huguenot. Particularly, since a year ago I thought we had established a commitment to one another to continue working together as one team, without a union.

> . . . There is no doubt that we are in a crisis situation here at Huguenot. Make no mistake about that. This plant is at a crossroads. Because of its economic situation, this plants future is uncertain, but no union, not the Teamsters, not the UAW, and not any other union, can provide people with job security.

I believe that the speech clearly conveys the message that if the Union is voted in there's a strong possibility that Respondent will close its Huguenot facility. Thus, Weber stated that he "thought we had a team here, and a commitment to one another." After he stated that he "can only hope that the faith I have had in this operation was justified" he continued "certain recent events have caused me to question this faith". After discussing the necessity to consolidate Respondent's operations at Perth or Huguenot Weber stated "if we are going to consolidate any operations, we first have to decide which plant would be the best one for this consolidation". Weber then stated that "words cannot express my extreme disappointment" about the Union coming and seeking an election. Finally, Weber stated that there is no doubt that "we are in a crisis situation here at Huguenot. Make no mistake about that. This plant is at a crossroads". Respondent provided no objective evidence that a decision to close the Huguenot plant would be based on demonstrably probable consequences beyond its control. See *Gissel Packing Co.*, supra, 395 U.S. at 618. Accordingly, I find that Respondent threatened employees with plant closure if they chose to be represented by the Union, in violation of

Section 8(a)(1) of the Act. See *Seville Flexpack Corp.*, 288 NLRB 518, 531 (1988).

With respect to the allegation that Weber threatened employees with loss of benefits, Williamson testified that Weber stated if the Union came in that the company would not refurbish the oxide mills. No witness corroborated Williamson's testimony and I find nothing in the written speech to substantiate the allegation. Accordingly, I find that General counsel has not shown by the preponderance of the evidence that the statement was made and I therefore dismiss the allegation.

2. Regressive Bargaining

The amended complaint alleges that during meetings with employees from November 1990 through January 1991 Respondent's representatives threatened that it would bargain from scratch regarding employee wages and benefits if the employees chose to be represented by the Union. The standard for determining whether statements of this type violate Section 8(a)(1) of the Act is set out in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), as follows:

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could by understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore.

> On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

See also *Lear-Siegler Management Service*, 308 NLRB 393 (1992).

Oliver Morgan, Jr., a maintenance department employee, testified that Respondent's representatives said "with the union getting it, it would make things difficult for the company to negotiate sales, because of bargainings, there could be pay raises, . . . when unions got in everything started from scratch, everything was scratch, we lost everything we had . . . ." Morgan was not able to specify exactly who made the statement or at which meeting. Oliver testified that Weglarz said "our wages would have to start from zero again . . . there was nothing guaranteed by the union". Weglarz testified, as follows:

> Orville Morgan, Jr., was one of the employees that asked a question and he asked me "Isn't it really true, Mr. Weglarz, that when you negotiate a union contract that you start from what you have?" and I said "That's not true". As the tape indicated, collective-bargaining is a give and take process and each party that goes to the table has different interests and the idea behind it is that they work with each other until they arrive at a mutual, agreeable package, and I indicated to him and to the people in that room that sometimes collective-bargaining

resulted in more, sometimes it resulted in the same and sometimes it resulted in less . . .

I credit Weglarz' testimony. I believe, that as an attorney familiar with labor law, it is likely he would have been careful to use language which would not violate the Act. See *King Trucking Co.*, supra, 259 NLRB at 728. I find that his statement was within the parameters permitted by *Taylor-Dunn Mfg. Co.*, supra, 252 NLRB at 800. Accordingly, the allegation is dismissed.

3. Disparaging Remarks

The amended complaint alleges that during meetings held with employees from November 1990 through January 1991 Respondent's representatives made disparaging remarks against the Union organizers. Morgan testified that company representatives said that Union organizers "would become shop stewards" and " we would receive a bonus of $500 from the Union and . . . conventions in Florida we'd be able to go to that other employees would not be able to go to". Similarly, Oliver testified that Weglarz stated that the Union organizers would "we all be getting $500 bonuses from the union, and we'd be going down to Florida to play golf at the conventions".

In support of its contention that the above statements constitute violations of the Act, General Counsel cites *Montgomery Ward & Co.*, 288 NLRB 126 (1988). In that case a supervisor referred to three known union adherents as the "Mafia" or "Mexican Mafia". The administrative law judge, affirmed by the Board,, stated (at 177):

> When considered in the context of all the unlawful activity engaged in by management officials and supervisors in opposition to the Union, Gore's reference to these three leading adherents of the Union as members of the Mafia takes on an unlawful connotation. Since their prominent role on behalf of the Union was well known throughout the store, not only to the employees but to members of management, it is apparent that Gore was equating their union activity with activities of a criminal element.

General Counsel has cited no case holding that statements such as were made by Weglarz constitute a violation of the Act. Clearly *Montgomery Ward*, supra, is distinguishable. There the employer referred to the Union leaders as "Mafia". Here, Weglarz simply said that the organizers would become stewards, would receive bonuses and would attend conventions in Florida. Such statements are not the type of "disparaging" remarks which are violative of the Act. Accordingly, the allegation is dismissed.

4. Verbal Warning to Williamson

On January 7, 1991 Respondent held one of its many departmental meetings at which time Imdorf read a prepared speech. I credit Williamson's testimony that Imdorf "told us his feeling about Unions are disruptive and he feels that the plant didn't need . . . a union". During the course of his speech Imdorf asked that the employees hold their questions until after his presentation, at which point Williamson exclaimed "Yeah, he might lose his

place'". After the meeting, Fronjian asked to see Williamson. While Williamson was waiting outside Fronjian's office he met Imdorf, who told him that he "didn't care for my comment in the meeting". Imdorf testified that Williamson, "{in a very loud sarcastic, rude voice" said, "don't interrupt him, he'll lose his place." During his meeting with Williamson, Fronjian credibly testified that "I started the conversation by asking why he took a shot at Art like that, why he interrupted him and made that comment, and he said, well I a\was mad and was a little bit angry that he was reading from prepared notes."

In Caterpillar Tractor Co., 276 NLRB 1323, 1326 (1985), the Board stated:

> The Board has found that an employee's use of obscenity was protected where it constituted a spontaneous outburst during the heat of a formal grievance proceeding or contract negotiations, or was provoked by an employer's unfair labor practice. However, it is well settled that concerted activity loses its protection under the Act when the actions are malicious, defamatory, or insubordinate. It is also well established that union stewards involved in the processing of grievances lose the protection of the Act when their conduct is extraordinary, obnoxious, wholly unjustified, and a departure from the res gestae of the grievance procedure. Here, by any reasonable standard, Waner's epithets against Kemper were malicious, defamatory, insubordinate, obnoxious, and wholly unjustified. [Footnotes omitted.]

Similarly, in *Reef Industries*, 300 NLRB 956, 961 (1990) the Board affirmed the administrative law judge's decision, which stated:

> I conclude, based on the numerous authorities cited above, that the means which the employees utilized to state their protest were not so " offensive, vulgar, defamatory or opprobrious" as to exclude them from the protection of the Act. Accordingly, the protest constituted protected activity.

The January 7 meeting was one of a series of meetings called by Respondent for the purpose of giving Respondent's reasons why the employees should not vote for the Union. In Imdorf's words, Williamson said in a "loud, sarcastic, rude voice", don't interrupt him, "he'll lose his place". When Fronjian asked Williamson why he made the comment Williamson replied that he was "a little bit angry that he was reading from prepared notes". Fronjian then issued a verbal warning to Williamson.

There is no question that Williamson's remark came in the context of protected activity. I conclude that Williamson's comment was not so "offensive, vulgar, defamatory or opprobrious" as to exclude it from the protection of the Act.

5. Suspension of Williamson

On January 25, 1991 Respondent held another of its mandatory meetings to discuss the upcoming Union election. After Imdorf had completed his presentation, an employee asked "why don't you give us the respect of choosing whether to come to these meetings or not. And

not make them mandatory because it's costing us money". After Imdorf responded to that question Williamson raised his hand and said that he had a two-part question. He then asked, "how many more of these meetings are we going to have?" At that point Imdorf exclaimed, "I've heard this question over a hundred times in every meeting. I'm getting tired of this question. These meetings are going to continue until I say that we don't have these meetings anymore". Imdorf then told Williamson that he could ask his question, at which point Williamson said "you're worthless". I credit Williamson's testimony that as soon as he said that, he then said "whoa, I don't mean you personally. But the question was worthless". Several witnesses corroborated Williamson's version and indeed Fronjian also confirmed that Williamson clarified his statement by saying that the "question was worthless". Fronjian then asked Williamson to come to his office. Fronjian told Williamson that "we had this conversation once before about you . . . making comments, disruptive, rude, loud, abusive types of comments in these meetings". Fronjian then told Williamson "because of what you've done, we're going to have to suspend you pending further evaluation".

Williamson's remark of "you're worthless" came in the context of protected activity. He was angry that he was required to attend the mandatory meetings. Imdorf had just responded that "these meetings are going to continue until I say that we don't have these meetings any more". At that point Williamson exclaimed "you're worthless". I do not find that this comment was so "offensive, vulgar, defamatory or opprobrious" as to exclude it from the protection of the Act. See *Reef Industries*, supra, 300 NLRB at 961. Rather, I believe that it constituted a "spontaneous outburst" during the question and answer period. See *Caterpillar Tractor Co.*, supra,

276 NLRB at 1326. Accordingly, Respondent's suspension of Williamson violated the Act.

6. Refusal to Reinstate Williamson

After Fronjian told Williamson that he was suspended pending further evaluation Williamson became angry and told Fronjian "why don't you do what you really want to do and fire me". The complaint alleges that Respondent discharged Williamson. Respondent argues that there was no discharge, but instead, Williamson tendered his voluntary resignation. In addition, Respondent argues that Williamson committed at least two separate offenses subsequent to his meeting with Fronjian, either of which warranted his immediate discharge. I credit Williamson's testimony that he stated "why don't you do what you really want to do and fire me" and did not tender his voluntary resignation. See *Emergency One, Inc.*, 306 NLRB 800,808 (1992). Instead, I find that the suspension "pending further evaluation" was an indefinite suspension.[4]

Respondent contends that subsequent to the suspension Williamson engaged in several acts which

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[4] On January 29, 1991 Williamson wrote Imdorf asking when he could return to work. On January 31 Imdorf replied "you no longer are considered to be an employee of C & D Charter Power Systems." I believe that as of January 31 the indefinite suspension was converted into a discharge. In this connection, I note that Respondent's answer admitted paragraph 8(b) of the complaint which alleged that Respondent suspended and discharged Williamson.

"warranted his immediate discharge". Since Respondent contends that it did not discharge Williamson, presumably it is Respondent's position that these acts were the reasons why it refused to reinstate Williamson. These acts consisted of the use of profanity, damage to property and the alleged threat to kill Tice.

I credit Fronjian's testimony that after he suspended Williamson Williamson shouted "f--- you, f--- this place". A number of witnesses testified that profanity is used frequently in the plant. Indeed, Schura testified that he used profanity in front of his supervisor. I find that profanity was frequently used in the plant and Respondent's refusal to reinstate Williamson because of the profanity is pretextual. In addition, Respondent contends that Williamson damaged company property by damaging a locker. Williamson testified that when Tice came into the locker room to tell him that Respondent had "accepted his resignation" he shut his locker three times. Tice testified that after he told Williamson "I understand that you've quit", Williamson became angry and started "smashing" a locker. Haring testified that Williamson "pounded" on the locker. A number of witnesses testified as to the poor condition of the lockers. I believe that after Tice told Williamson that he "quit", Williamson became angry and slammed the locker shut and pounded it as well. The record does not show the extent of the damage, if any, Williamson caused to the locker. I find that the lockers were in poor condition and that Respondent's refusal to reinstate Williamson because he pounded the locker is pretexual. With respect to the threats, Tice testified that during the same episode, after he told Williamson that Williamson had "quit", Williamson became angry and said "I'm going to f--- kill you". Williamson denied threatening Tice. I find that Respondent has not shown by a preponderance of the evidence that the threat was made.

7. Respondent's Defenses

Respondent maintains that prior to its verbal warning and subsequent suspension of Williamson it was not aware of Williamson's "union activity involvement". I have credited Williamson's testimony that he covered over the "no" button given to him by Balmos and wrote "yes" on it. When Imdorf say it he said "there's a man who knows what he wants". In addition Williamson distributed leaflets in the cafeteria on two occasions. I also credit the testimony of several employees who testified that Williamson was outspoken at the meetings conducted by Respondent. More importantly, however, the verbal warning given on January 7 was specifically given in response to what Respondent considered a rude and sarcastic remark by Williamson. I have already found that the remark did not lose it protection under the Act. Clearly Respondent had knowledge of the remark, for it was the very reason why Williamson was disciplined. Similarly, Williamson's statement on January 25 that "you're worthless" was the very reason why he was given the indefinite suspension.

After Williamson's indefinite suspension he engaged in the use of profanity and he slammed shut and pounded his locker. Respondent maintains that these were dischargeable offenses and were the reasons why Williamson was not offered reinstatement. As discussed above, I find these reasons to be pretextual. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982): *Arthur Young & Co.*, 291 NLRB 39 (1988). In addition, under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied, 455 U.S. 989 (1982), Respondent has not sustained its burden of showing that the "same action

would have taken place even in the absence of the protected conduct". No showing has been made that employees were either discharged or denied reinstatement for similar activities.

Conclusions of Law

1. Respondent, C & D Charter Power Systems, Inc., is an employer engaged in commerce within the meaning os Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with plant closure if they chose to be represented by the Union, Respondent violated Section 8(a)(1) of the Act.

4. By issuing a verbal warning, suspending and discharging Robert Williamson, and by failing to offer to reinstate him, for activities protected by the Act, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act in any other manner alleged in the complaint.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order respondent to cease and desist therefrom and to take

certain affirmative action to effectuate the policies of the Act.

Respondent, having suspended and discharged Robert Williamson in violation of the Act, I find it necessary to order Respondent to offer him full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered from the time of his suspension to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula approved in *F.W. Woolworth co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

Upon the foregoing findings of fact, conclusions of law and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended.[6]

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[5] Under *New Horizons*, interest is computed at the "short-term Federal rate" for underpayment of taxes as set out in the 1988 amendment to 26 U.S.C Section 6621.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, C & D Charter Power Systems, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure if they choose to be represented by the Union

(b) Disciplining, suspending and discharging employees for activities protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative necessary to effectuate the policies of the Act.

(a) Offer Robert Williamson immediate and full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings, with interest, in the manner set forth in the section above entitled "The Remedy".

(b) Remove from its files any reference to the unlawful suspension and discharge of Williamson and notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(c) Preserve and upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amounts owing under the terms of this Order.

(d) Post at its facility in Huguenot, New York, copies of the attached notice marked "Appendix."[7]

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations as to which no violations have been found are hereby dismissed.

Dated, Washington, D.C. November 2, 1994

D. Barry Morris
Administrative Law Judge

[7] If this Order is enforced by the Judgement of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1491 September Term, 1995

C & D Charter Power Systems,
Petitioner

v.

National Labor Relations Board,
Respondent

On Petition for Review and Cross-Application for Enforcement of an Order the National Labor Relations Board

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Before: WILLIAMS, HENDERSON and Randolph, *Circuit Judges*.

JUDGMENT

This cause came to be heard on a petition for review of an order of the National Labor Relations Board and a cross-application for enforcement, and was briefed by counsel. While the issues presented occasion no need for a published opinion, they have been accorded full

consideration by the court. See D.C. Cir.R. 36(b). It is therefore

ORDERED and ADJUDGED that the petition for review is denied and the Board's cross-application for enforcement granted. Substantial evidence supports the Board's finding with respect to the warning, suspension and dismissal of Williamson; petitioner has advanced no intelligible arguments with respect to the alleged plant-closing threat.

The clerk is direct to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir.R 41. This instruction to the clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT
Mark J. Langer, Clerk

BY:

Deputy Clerk

Supreme Court, U.S.
FILED
OCT 23 1996

(3)

No. 96-296

In the Supreme Court of the United States

OCTOBER TERM, 1996

C & D CHARTER POWER SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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15pp

QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by suspending and then discharging employee Robert Williamson because he engaged in protected activity.

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§ 8(a)(3), 29 U.S.C. 158(a)(3) 2, 4
§ 10(e), 29 U.S.C. 160(e) 10

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-296

C & D CHARTER POWER SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. C1-C2) is unpublished, but the decision is noted at 88 F.3d 1278 (Table). The decision and order of the National Labor Relations Board (Pet. App. A1-A5), and the decision of the administrative law judge (Pet. App. B1-B24), are reported at 318 N.L.R.B. 798.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. The petition for a writ of certiorari was filed on August 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]" of the Act. Section 7 of the Act, 29 U.S.C. 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

2. Petitioner manufactures batteries at a plant in Huguenot, New York. In the fall of 1990, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Union) launched an organizing campaign at the plant. Pet. App. B2-B3. During the Union's campaign (which culminated in an election on January 31, 1991), petitioner held a series of 50 or 60 anti-union meetings with employees in the plant during working time. Employees resented the meetings, because attendance was mandatory, thereby causing employees to lose the opportunity to earn extra income on the production line under petitioner's piece-incentive program. *Id.* at A2.

One such mandatory meeting was held on January 25, 1991. At that meeting, Arthur Imdorf, the plant

manager, made a presentation to the employees. After Imdorf's presentation, Robert Williamson, an active Union supporter, raised his hand, stated that he had a two-part question, and asked Imdorf, "How many more of these meetings are we going to have?" Imdorf heatedly replied: "I've heard this question over a hundred times in every meeting. I'm getting tired of this question. These meetings are going to continue until I say that we don't have these meetings anymore." Imdorf then told Williamson to proceed with his question. In response, Williamson initially remarked, "you're worthless," but then immediately retracted his comment and clarified that "I don't mean you personally, but the question was worthless." Pet. App. A2-A3, B6, B17.

At the conclusion of the January 25 meeting, Harry Fronjian, petitioner's human relations manager, confronted Williamson about his remark to Imdorf and informed him that "because of what you've done, we're going to have to suspend you pending further evaluation." Pet. App. B6, B17. Williamson asked Fronjian, "why don't you do what you really want to do and fire me[?]" *Id.* at B7. Williamson then left Fronjian's office and, shouting expletives, proceeded to the locker room, where he encountered John Tice, a supervisor. There, Tice told Williamson, "I understand that you've quit, and you know that's the way we're going to record it and we'll let the unemployment know." *Ibid.* Angered by Tice's assertion that he had "quit," Williamson slammed his locker shut and pounded on it. *Id.* at B19.

On January 29, 1991, four days after Fronjian suspended him, Williamson wrote to Imdorf, inquiring when he could return to work. On January 31, Imdorf informed Williamson that "you no longer are con-

sidered to be an employee of [petitioner]." Pet. App. B18 n.4.

3. Upon charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner alleging, among other things, that its discharge of Williamson violated Section 8(a)(1) and (3) of the Act. Pet. App. B1-B2. Following a hearing, the administrative law judge (ALJ) sustained the allegation. *Id.* at B21, B24.

First, the ALJ found that Williamson's "you're worthless" remark during the January 25 meeting was protected by Section 7. Pet. App. B17. The ALJ explained that the remark "came in the context of protected activity," and it constituted a permissible "'spontaneous outburst' during the question and answer period," *ibid.* (quoting *Caterpillar Tractor Co.*, 276 N.L.R.B. 1323, 1326 (1985)), rather than an "offensive, vulgar, defamatory, or opprobrious" remark of the kind falling outside of the Act's protection. Pet. App. B17 (quoting *Reef Industries, Inc.*, 300 N.L.R.B. 956, 961 (1990), enforcement granted, 952 F.2d 830 (5th Cir. 1991)).

Second, the ALJ found that Williamson's protected activity at the January 25 meeting was "the very reason why" petitioner discharged him. Pet. App. B20.[1] In so finding, the ALJ considered and rejected several explanations that petitioner proffered as the actual reasons motivating the discharge. *Id.* at B18-B19. Petitioner contended that it discharged William-

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[1] The ALJ found that Williamson's January 25 suspension effectively became a discharge as of January 31, the date on which Imdorf informed Williamson that petitioner no longer considered him to be an employee. Pet. App. B18 n.4.

son, not because of his protected activity during the January 25 meeting, but because he subsequently had used profanity as he exited Fronjian's office and damaged company property (his locker) in reaction to supervisor Tice's assertion that he had "quit." *Id.* at B19. The ALJ held, however, that petitioner's explanations were pretextual, because the use of profanity was commonplace in the plant, the lockers were generally in poor condition, and "[t]he record does not show the extent of the damage, if any, Williamson caused to the locker." *Ibid.* The ALJ also rejected petitioner's contention that it discharged Williamson, not because of his protected activity, but because he subsequently had allegedly threatened to kill supervisor Tice. The ALJ found instead that "[petitioner] has not shown by a preponderance of the evidence that the threat was made." *Ibid.*

Lastly, the ALJ concluded that, even if Williamson's use of profanity and damage to the locker were not pretexts, but, rather, a dual motive for the discharge (along with the unlawful motive), petitioner had failed to "sustain[ ] its burden of showing that the 'same action would have taken place even in the absence of the protected conduct,'" because "[n]o showing has been made that employees were * * * discharged * * * for similar activities." Pet. App. B20-B21 (citing *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)).

The Board adopted the ALJ's findings and conclusions, and ordered petitioner to reinstate Williamson with backpay. Pet. App. A1, A4-A5, B23.

4. The court of appeals enforced the Board's order in an unpublished summary decision. Pet. App. C1-C2. The court held that substantial evidence sup-

ported the Board's finding that petitioner's discharge of Williamson violated the Act. *Id.* at C2.

ARGUMENT

1. Petitioner's principal contention is that this case presents "the issue as to the proper analysis to be used when confronted with a mixed motive employment decision" (Pet. 21), that is, an employment decision that "was motivated by both lawful and discriminatory reasons" (Pet. 11).[2] Petitioner contends (Pet. 11-18) that a conflict among the courts of appeals exists on that issue. Petitioner further asserts (Pet. 19) that the Board "failed to consider or resolve the

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[2] In this Court, petitioner does not challenge the Board's ruling (Pet. App. A3-A4) that Williamson's conduct during the January 25 meeting constituted "concerted" activity within the meaning of Section 7 of the Act. Before the Board, petitioner contended that Williamson's conduct during the January 25 meeting was not protected by the Act because it was not "concerted" under Section 7. Pet. App. A2. The Board rejected that contention, concluding that Williamson's comments constituted concerted activity "because they were the logical outgrowth of the prior concerted complaints the employees voiced about being required to attend [petitioner's] numerous meetings and to lose the incentive pay they could otherwise be earning." *Id.* at A3-A4. Petitioner did not challenge the Board's ruling in the court of appeals, and it is not at issue here. The Board also found, in agreement with the ALJ, that Al Weber, petitioner's president, delivered a speech on December 21, 1990, in which he unlawfully threatened employees with plant closure if they voted for the Union. *Id.* at A1, B10-B11, B21. The court of appeals sustained the Board's finding, concluding that petitioner had advanced "no intelligible arguments" to the contrary. *Id.* at C2. In this Court, while petitioner continues to characterize Weber's speech as "lawful" (Pet. 5), it does not actually challenge the Board's ruling to the contrary.

issue of a dual motive or the requisite analysis" respecting Williamson's discharge.

This case, however, does not actually present the issues raised by petitioner. The ALJ, whose finding was adopted by the Board and upheld by the court of appeals, concluded that petitioner's decision to discharge Williamson was *not* attributable to mixed motives. Rather, Williamson's protected activity was "the very reason why" petitioner discharged him, and its allegedly lawful justifications for the discharge—his using profanity, damaging the locker, and threatening supervisor Tice after the January 25 meeting—were mere pretexts. Pet. App. B19, B20.

Accordingly, the question presented by this case is whether substantial evidence supports the Board's finding that petitioner's allegedly lawful justifications for Williamson's discharge were in fact pretextual.[3] The court of appeals answered that question in the affirmative. Pet. App. C2. Although petitioner apparently disagrees with the court's holding (see Pet. 24-26), the court's assessment of the evidentiary record raises no issue warranting further review by this Court, particularly where, as here (see Pet. 19-21; Pet. App. A1 n.1), petitioner's main disagreement with the decision below is with the ALJ's credibility determinations, which the Board in turn upheld. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[4]

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[3] It is well settled that "if the employer fires an employee for having engaged in union activities and * * * the reasons that he proffers are pretextual, the employer commits an unfair labor practice." *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 398 (1983).

[4] As the Court explained in *Universal Camera Corp.*: "Whether on the record as a whole there is substantial evidence

2. In any event, the contentions advanced by petitioner are without merit.

a. In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), this Court upheld the rules governing "dual motive" or "mixed motive" cases established by the Board in *Wright Line, Inc.*, *supra*. 462 U.S. at 400-403. As the Court explained:

> [T]he General Counsel * * * ha[s] the burden of proving that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge. Even if this was the case, and the employer failed to rebut it, the employer could avoid being held in violation of §§ 8(a)(1) and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event.

Id. at 400 (footnote omitted); see also *id.* at 399 & n.4. The Board and the court of appeals properly affirmed the ALJ's finding that the General Counsel had met his burden, and that petitioner had failed to sustain its affirmative defense. Pet. App. A1-A4; *id.* at C2.

b. Petitioner mischaracterizes the record in contending (Pet. 19) that the ALJ and the Board "failed to consider or resolve the issue of a dual motive or the

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to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." 340 U.S. at 491. Petitioner has not demonstrated that the decision below is one of those "rare instances" in which the substantial evidence test has been so "misapprehended or grossly misapplied" by the court of appeals as to warrant this Court's intervention.

requisite analysis" in connection with Williamson's discharge. As noted, the ALJ found that petitioner's proffered lawful justifications for discharging Williamson were pretextual. Pet. App. B19. The ALJ went on to conclude that, even if petitioner's proffered lawful explanations for the discharge were not merely pretextual, but, rather, constituted a dual motive (along with its unlawful, retaliatory motive), the discharge of Williamson nonetheless violated the Act, because petitioner made "[n]o showing" that other employees had been discharged for similar acts of alleged misconduct. *Id.* at B20-B21 (applying *Wright Line, Inc.*). And, far from "fail[ing] to consider" the issue (Pet. 19), the Board in fact adopted the ALJ's conclusions. Pet. App. A1.

Petitioner's related contention (Pet. 11, 16-18) that there is a conflict among the courts of appeals as to the proper legal framework for analyzing mixed-motive discharge cases under the Act also lacks merit. The decisions upon which petitioner relies (Pet. 16-18) for the alleged circuit conflict all pre-date this Court's decision in *Transportation Management Corp., supra.* By upholding the Board's *Wright Line, Inc.* decision as a reasonable construction of the Act, the Court in *Transportation Management Corp.* fully resolved the circuit conflict to which petitioner refers. See 462 U.S. at 397 & n.3, 400-403.

3. Petitioner invites this Court to hold that Section 107 of the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166, 105 Stat. 1075 (42 U.S.C. 2000e-2(m), 2000e-5(g)(2)(B)), applies to mixed-motive cases arising under the National Labor Relations Act and limits the Board's remedial authority in such cases.

Pet. 21-24, 27.[5] The Court should decline petitioner's invitation, for its claim is not properly presented and, in any event, is unpersuasive.

a. Petitioner did not raise its Section 107 claim before the Board or the court of appeals. Petitioner's failure to advance that claim before the Board creates a jurisdictional bar to its consideration in judicial proceedings reviewing the Board's order. See Section 10(e) of the Act, 29 U.S.C. 160(e);[6] *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). Moreover, because petitioner did not raise its claim in the court below, petitioner has failed to preserve it for

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[5] Section 107 amended the Civil Rights Act of 1964 in two respects. First, Section 107(a) (105 Stat. 1075) added a new subsection to the statute, 42 U.S.C. 2000e-2(m), which provides: "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Second, Section 107(b) (105 Stat. 1075) added a new subparagraph to the statute, 42 U.S.C. 2000e-5(g)(2)(B), which provides: "On a claim in which an individual proves a violation under section [2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court * * * may grant declaratory relief, injunctive relief * * * and attorney's fees * * * and * * * shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."

[6] Section 10(e) provides, in relevant part: "No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has alleged no such "extraordinary circumstances" here.

review here. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

b. In any event, petitioner's Section 107 claim lacks merit. Petitioner cites no authority applying Section 107 of the CRA in analogous circumstances, nor any provision of the CRA or its legislative history to demonstrate that Congress intended the CRA to supplant the NLRA as it had been construed by this Court in *Transportation Management Corp.*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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